

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
July 13, 2006 Session

**TERRA AQUA GABIONS, INC. v. MIDWEST CONSTRUCTION  
PRODUCTS CORPORATION**

**Direct Appeal from the Chancery Court for Davidson County  
No. 05-347-II Carol McCoy, Chancellor**

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**No. M2005-01753-COA-R3-CV - Filed on July 28, 2006**

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Plaintiff/Appellant filed its cause of action alleging interference with prospective business relations and violation 15 U.S.C. § 1125 (the Lanham Act). The trial court granted Defendant's Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss. We affirm in part, reverse in part, and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in part;  
Reversed in part; and Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Malcolm L. McCune and Michael D. Hornback, Nashville, Tennessee, and Peter W. Brolick and Sharon K. Weaver, Tulsa, Oklahoma, for the appellant, Terra Aqua Gabions, Inc.

J. Brent Moore, Nashville, Tennessee, for the appellee, Midwest Construction Products Corporation.

**OPINION**

This appeal arises from an order of dismissal under rule 12.02(6) of the Tennessee Rules of Civil Procedure by the Chancery Court for Davidson County of Plaintiff's February 2005 complaint, as amended,<sup>1</sup> alleging interference with prospective business relations and unfair competition in

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<sup>1</sup>Plaintiff filed its original complaint on February 7, 2005. Plaintiff moved to amend its complaint on June 10, 2005. On June 20, Defendant responded to Plaintiff's motion, stating it did not oppose the motion. The trial court heard Plaintiff's motion to amend on June 24. The trial court dismissed the action for failure to state a claim on July 1, 2005. Plaintiff filed its notice of appeal to this Court on July 15. On July 19, the trial court filed its order granting Plaintiff's motion to amend and reaffirming its order of dismissal. In its July 19 order, the trial court stated "after granting the amendment, the Court heard Defendant's motion to dismiss for failure to state a claim. The court dismissed the complaint, as amended, by separate order."

(continued...)

violation of the Lanham Act (“the Act”) as codified at 15 U.S.C. § 1125. Plaintiff/Appellant Terra Aqua Gabions, Inc. (“Terra Aqua”) and Midwest Construction Products Corp. (“Midwest”) are manufacturers of gabions, wire baskets or cages that are filled and used in building supports and abutments in bridges, roadways, retaining walls, stream banks and river channeling. According to Terra Aqua and undisputed by Midwest, the structural integrity of gabions is crucial, and the failure of a gabion could result in the collapse of a bridge or similar disaster. Thus, manufacturers of gabions must certify whether they comply with specific standards, including those known as “ASTM A974-97” and/or “ASTM A975-97” standards (“the ASTM standards”).

In early 2004, SEI Environmental (“SEI”) requested bids for woven wire gabions and/or welded wire panel gabions for a project funded by the National Resources Conservation Service (“NRCS”). In its complaint, Terra Aqua asserted the NRCS expressly and/or impliedly required that all gabions on the project comply with the ASTM standards. Terra Aqua submitted a bid in March 2004. It asserts that Midwest submitted a bid at about the same time, and that both manufacturers certified that their gabions complied with the ASTM standards. In its complaint, Terra Aqua alleged, “[i]n submitting its bid, Midwest expressly and/or impliedly represented that its welded wire panel gabions complied with ASTM standard A974-97.” Terra Aqua attached Midwest specification details as an exhibit to its complaint. The specifications page lists several ASTM standards with which Midwest asserts it complies and states, in bold face: “Gabions and Mattresses conform to ASTM A974-97.” SEI accepted Midwest’s bid for the project.

In its complaint, Terra Aqua asserted two causes of action against Midwest. First, Terra Aqua asserted interference with prospective business relations. It alleged that Midwest had knowledge beyond mere awareness of Terra Aqua’s prospective business relationship with SEI Environmental, and that Midwest’s intent and motive was to extinguish that relationship by use of fraudulent advertising and/or promotion, which consisted of Midwest’s certification that it complied with the ASTM standard. Terra Aqua alleged Midwest’s “interference was reckless, malicious and/or wrongful” and that Terra Aqua sustained damages as a proximate result of Midwest’s tortious conduct. Second, Terra Aqua alleged that it is a direct competitor to Midwest, that Midwest’s products do not comply with the ASTM standards, and that Midwest’s engages in deceptive advertising and/or promotion in violation of the Lanham Act. Terra Aqua sought damages in the amount of \$250,000, reasonable attorney’s fees, and all other proper relief.

Midwest filed a Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss or, in the alternative, for summary judgment on June 2, 2005. In its motion, Midwest asserted Terra Aqua had failed to allege sufficient facts to support the asserted claims and its allegations of fraud. The trial court granted Midwest’s motion to dismiss by final order entered on July 19, 2005, and Terra Aqua filed a timely notice of appeal to this Court. We affirm dismissal under Tennessee Rule of Civil Procedure 12.02(6) of Terra Aqua’s tort claim for intentional interference with prospective business

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<sup>1</sup>(...continued)

Accordingly, we shall consider the complaint reviewed by the trial court for the purposes of Defendant’s rule 12.06(6) motion to dismiss to be Plaintiff’s amended complaint.

relations, reverse dismissal of Terra Aqua's claims under the Lanham Act, and remand for further proceedings.

### ***Issues Presented***

Terra Aqua presents the following issues for our review:

- (1) Whether the trial court erred in granting Appellee's motion to dismiss as related to Terra Aqua's cause of action for interference with prospective business relations.
- (2) Whether the trial court erred in granting Appellee's motion to dismiss as related to Terra Aqua's cause of action for violation of the Lanham Act.

Midwest raises the additional issue of whether this Court has subject matter jurisdiction over the Lanham Act claim.

### ***Standard of Review***

A rule 12.02(6) motion to dismiss challenges only the legal sufficiency of the complaint itself, and not the strength of the plaintiff's proof. *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002)(citations omitted). The court must construe the complaint liberally, presuming all facts as alleged by plaintiff to be true and "giving the plaintiff the benefit of all reasonable inferences." It is well-settled that the trial court should not dismiss the complaint for failure to state a claim unless it appears that the plaintiff can prove no facts in support of the claim that would warrant relief. *Id.* "Great specificity in the pleadings is ordinarily not required to survive a motion to dismiss; it is enough that the complaint set forth a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* (citations omitted). We review the trial court's award of a rule 12.02(6) motion to dismiss *de novo*, with no presumption of correctness. *Id.* at 697.

### ***Analysis***

We first turn to whether the trial court erred in dismissing Terra Aqua's claim of interference with prospective business relations. The tort of intentional interference with prospective business relationships was recognized in this state by the Tennessee Supreme Court in *Trau-Med of America, Inc. v. Allstate Insurance Co.*, 71 S.W.3d 691 (Tenn. 2002) (partially overruling *Nelson v. Martin*, 958 S.W.2d 643 (Tenn. 1997)). In *Trau-Med*, the court held that, to succeed on a claim for interference with prospective business relationships, the plaintiff must demonstrate:

- (1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons;
- (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general;
- (3) the defendant's intent to cause the breach or termination of the

business relationship; (4) the defendant's *improper motive or improper means*; and finally, (5) damages resulting from the tortious interference."

*Trau-Med*, 71 S.W.3d at 701(emphasis in original; notes and citations omitted).

As the *Trau-Med* court noted with regard to the fourth element, "a precise, all-encompassing definition of the term 'improper'" is not possible. *Id.* at n.5. Rather, the "determination of whether a defendant acted 'improperly' or possessed an 'improper' motive is dependent on the particular facts and circumstances of a given case[.]" *Id.* The court provided a non-exclusive list of methods which might constitute improper methods, including, *inter alia*, acts that are "illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules;" fraud or misrepresentation; and "those methods that violate an established standard of a trade or profession, or otherwise involve unethical conduct, such as sharp dealing, overreaching, or unfair competition." *Id.*

As the *Trau-Med* court implicitly recognized, however, not every tortious, unethical, or unfair act constitutes the tort of intentional interference with prospective business relationships. *See id.* Rather, the *Trau-Med* court emphasized that the plaintiff must demonstrate that the "predominant purpose" of the defendant's improper motive or act was to injure the plaintiff. *Id.*

In the present case, Terra Aqua's complaint alleges Midwest had knowledge of the prospective business relationship between Terra Aqua and SEI beyond a mere awareness of general business dealing, and that Midwest's misrepresentation of its compliance with the ASTM standards was an improper act. It also concludes that "Midwest's intent was to extinguish the prospective business relationship between SEI Environmental and Terra Aqua." However, assuming Midwest did, in fact, misrepresent that its gabions complied with ASTM standards, Terra Aqua provides no facts to support its contention that Midwest's predominant purpose in making this misrepresentation was to injure Terra Aqua.

This case requires the court to draw the sometimes fine line between competition, albeit allegedly unfair, and tortious interference with a prospective business relationship. In *Trau-Med*, plaintiff Trau-Med alleged that defendant Allstate interfered with Trau-Med's business relationships by interfering with six actions filed in Shelby County courts, by making false statements about Trau-Med's business, and by threatening to "protract the litigation process." *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002). The court held Trau-Med had stated a cause of action for tortious interference with a business relationship where it had stated facts sufficient to demonstrate that "Allstate's predominant motive was to drive Trau-Med out of business for the sole purpose of limiting health care access to indigent claimants to 'control and limit [Allstate's] claims expenses.'" *Id.* at 702. In short, the facts alleged by the plaintiff in *Trau-Med* supported its allegations that the predominant motive and purpose of the defendant's actions was to injure, and not merely compete with, the plaintiff.

In the present case, the facts alleged by Terra Aqua, presumed to be true for the purposes of the 12.02(6) motion, do not support a claim that Midwest's predominant motive was to injure Terra Aqua. The parties do not dispute that they are among a few manufacturers of gabions, nor do they dispute that they were in competition for the SEI contract. Assuming that Midwest misrepresented that its gabions complied with ASTM standards, and assuming such misrepresentation was intentional, there is nothing to suggest that Midwest's predominant purpose was not simply to compete with Terra Aqua and all other manufacturer's of gabions. Terra Aqua does not allege that Midwest misrepresented the quality of Terra Aqua's product, nor does it allege that Midwest directed any act at Terra Aqua. Assuming Midwest engaged in unfair competition by misrepresenting the quality of its products, unlike *Trau-Med*, there is nothing in Terra Aqua's complaint to suggest that Midwest's actions were directed purposefully at or against Terra Aqua for the predominant purpose of causing injury to Terra Aqua. Although perhaps otherwise actionable, Midwest's alleged misrepresentation on what appears to be a general certificate of compliance, without more, does not constitute tortious intentional interference with prospective business relations. Terra Aqua has simply failed to assert any set of facts which would support a determination that Midwest's predominant motive in (allegedly) misrepresenting that its gabions conformed to the ASTM standards was to injure Terra Aqua. Accordingly, we affirm dismissal of Terra Aqua's tort action for intentional interference with prospective business relations.

We next turn to Terra Aqua's claim under the Lanham Act. Midwest asserts that Terra Aqua's claim under the Lanham Act is a federal law question over which the state courts lack subject matter jurisdiction. Subject matter jurisdiction concerns the authority of a court to hear a controversy. *Meighan v. U.S. Sprint Commc'ns*, 924 S.W.2d 632, 639 (Tenn. 1996). If a court acts without subject matter jurisdiction, its orders are void. *Riden v. Snider*, 832 S.W.2d 341, 343 (Tenn. Ct. App.1991). Such orders are a nullity and may be collaterally attacked. *County of Shelby v. City of Memphis*, 365 S.W.2d 291, 292 (Tenn. 1963).

There is a strong presumption that state courts retain jurisdiction concurrent with federal courts over claims brought pursuant to federal law. *Walker v. White*, 89 S.W.3d 573, 577 (Tenn. Ct. App. 2002)(citing *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990)). Such state court jurisdiction is limited only by restrictions imposed by the Supremacy Clause of the United States Constitution. *Id.* State court jurisdiction over federal causes of action does not arise because it is specifically conferred by Congress. *Id.* (citing *Tafflin*, 493 U.S. at 469, 110 S.Ct. 792 (Scalia, J., concurring)). Rather, such jurisdiction is presumed in the absence of "an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction." *Id.* (quoting *Tafflin*, 493 U.S. at 470, 110 S.Ct. 792). State courts retain concurrent jurisdiction over federal claims unless Congress deliberately uses its authority to affirmatively remove that jurisdiction. *Id.*

Although Tennessee courts have not previously specifically considered the question of subject matter jurisdiction over claims of unfair competition brought under the Lanham Act, this Court implicitly has recognized such jurisdiction. See *United Brake Sys., Inc. v. Am. Envtl. Prot.*, 963 S.W.2d 749 (Tenn. App.1997). We agree with the federal courts and our sister jurisdictions that state courts have concurrent subject matter jurisdiction to adjudicate claims of unfair competition

brought under the Lanham Act. *E.g., Health Care and Ret. Corp. of Am. v. Heartland Home*, 324 F.Supp.2d 1202, 1208 (D. Kan. 2004); *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 84 F.3d 1388, 1394 (11th Cir.1996), cert. denied, 526 U.S. 1050 (1999); *Pennsylvania State Univ. v. Univ. Orthopedics, Ltd.*, 706 A.2d 863, 867 n.2 (Pa. Super. 1998); *Pioneer First Fed. Sav. & Loan Ass'n. v. Pioneer Nat'l Bank*, 659 P.2d 481, 487 (Wash. 1983); *Flagship Real Estate Corp. v. Flagship Banks, Inc.*, 374 So.2d 1020, 1021 (Fla. Dist. Ct. App. 1979).

We finally address Terra Aqua's contention that the trial court erred by granting Midwest's rule 12.02(6) motion and dismissing Terra Aqua's claims under the Lanham Act. Section 43(a) of the Lanham Act provides, in pertinent part,

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1). In order to succeed on a claim under this section, the plaintiff must demonstrate that the defendant "misrepresented an 'inherent quality or characteristic' of the . . . product" in its commercial advertising or promotion. 15 U.S.C. § 1125(a)(1)(B); *Nat'l Ass'n of Pharm. Mfrs. v. Ayerst Labs.*, 850 F.2d 904, 917 (2d Cir.1988)(citing *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 278 (2d Cir.1981)). To establish a cause of action under the Act, the plaintiff must demonstrate:

1) the defendant has made false or misleading statements of fact concerning his own product or another's; 2) the statement actually or tends to deceive a substantial portion of the intended audience; 3) the statement is material in that it will likely influence the deceived consumer's purchasing decisions; 4) the advertisements were introduced into interstate commerce; and 5) there is some causal link between the challenged statements and harm to the plaintiff.

*Am. Council of Certified Podiatric Physicians and Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 613 (6<sup>th</sup> Cir. 1999)(citing *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 922-23 (3d Cir.1990); *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 (D.C.Cir.1990)). A plaintiff seeking an award of monetary damages under the Act for false or

misleading advertising or promotion must establish that the defendant's material is either literally false or that it is true but misleading or confusing. *Id.* at 614 (citations omitted). Where the defendant's statements are literally false, deception is presumed and a violation may be established without proof that consumers were actually misled. *Id.* (citations omitted). Where literally true statements are nevertheless deceptive, or where a statement is so ambiguous that literal falsity cannot be established, the plaintiff must demonstrate that the consumer was, in fact, deceived. *Id.* (citing *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 229 (3d Cir.1990)). Additionally, a claim brought under the Lanham Act claim must be based upon a statement of fact, and not a statement of opinion. *Id.* (citing *Groden v. Random House, Inc.*, 61 F.3d 1045, 1052 (2d Cir.1995); *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F.Supp. 115, 136 (D.Mass.1996)).

As noted above, in its complaint, Terra Aqua asserted that Midwest misrepresented its products in promotional material where it asserted that gabions produced by Midwest met the requisite ASTM standards; that Midwest's promotional material certifying ASTM compliance was deceptive; that SEI required that gabions meet the ASTM standards; that the material was in interstate commerce; and that Midwest's bid was accepted over Terra Aqua's as a result of the misrepresentations. Terra Aqua further asserted "Midwest welded wire panel gabions did not comply with ASTM standard A974-97 in several regards, including but not limited to, section 6.5 of the Standard." Terra Aqua further asserted:

Section 6.5 requires that "Gabions and gabion mattresses shall be manufactured with all components mechanically connected at the production facility with the exception of the mattress lid which may be produced separately from the base."

Section 6.5 was included in the subject standard so that the gabion manufacturer would have complete knowledge and control of compliance with all requirements of ASTM A974-97.

Midwest is selling gabions and gabion mattresses which are not completely manufactured and mechanically connected at the same production facility.

THUS, Midwest does not have complete control of all elements of compliance, including but not limited to tensile strength, weld shear strength, dimensions and tolerances, workmanship, PVC coating, and testing methods.

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Based upon Midwest's representations to SEI Environmental and/or NRCS, Midwest was chosen as the supplier of welded wire panel gabions for the Project.

Midwest, on the other hand, in its brief to this Court, submits that it "is in no way questioning that the quality of gabion construction . . . is crucial to the gabion industry and to society in general." Midwest asserts, however, that Terra Aqua cannot maintain an action under the sixth circuit's holding in *Council of Certified Podiatric Physicians* because Midwest's statements concerning the

quality of its gabions was an “assertion of opinion rather than an assertion of fact.” It submits that there is no “objective board that monitors gabions for conformity with the ASTM standards” and that “[a]ny representation[,] therefore, as to whether a single gabion complies with every provision is necessarily a person’s opinion.” We disagree.

Midwest’s promotional material unambiguously state that its gabions conformed to the ASTM standards. This is neither mere “puffery” nor an opinion. The standards excerpted in Terra Aqua’s complaint demonstrate that the ASTM standards are exacting. Although construing precisely what the standards in fact demand and whether a manufacturer’s product complies with those standards may require expert testimony and evidence, either a manufacturer’s gabions comply with the standards or they do not. It is inconceivable that, given the importance of a gabion’s quality and integrity, compliance with the ASTM standards is a matter of individual opinion. The undisputed importance of gabions to the integrity of public structures, moreover, combined with the fact that purchasers of gabions rely on manufacturer’s certifications that their products comply with the applicable standards, underscores the importance of promotional material to consumer-purchasers in the industry.

Midwest further asserts that the sixth circuit “left the door open that Lanham Act litigation applies only to ‘consumers’ and the general public” and that SEI, an experienced and sophisticated entity, qualifies as neither. Midwest’s argument, as we perceive it, is that its material was not “promotional material” for the purposes of the Lanham Act where it was directed not to the general public but to sophisticated industry professionals. We again disagree.

To the extent that the sixth circuit has left open the question of to whom advertising and promotional material must be directed under the Lanham Act, other appellate courts construing the Act have offered different interpretations of the type and extent of commercial speech necessary to constitute “commercial advertising or promotion.” *See, e.g., Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002)(discussing construction of “advertising” and “promotion” and the extent of activity necessary to fall within the purview of the Lanham Act). Although the Lanham Act does not encompass all commercial speech, *First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 803-804 (7th Cir. 2001), it is not limited to traditional, widespread advertising campaigns. *E.g., Fashion Boutique*, 314 F.3d at 57; *Sports Unlimited, Inc. v. Lankford Enters., Inc.*, 275 F.3d 996, 1005 (10th Cir.2002); Rather, the extent to which material may be considered advertising or promotional material under the Act has been defined as somewhat “elastic,” and, depending on the particular facts and circumstances, may be modest. *Sports Unlimited*, 275 F.3d at 1005. In general, it applies to speech or materials designed to disseminate information to the purchasing public in order to penetrate the market. *Fashion Boutique*, 314 F.3d at 57. “Promotion,” moreover, in contrast to traditional advertising material directed to the general public, encompasses representations within the industry, such as trade show displays and sales presentations to potential buyers. *Id.* (citing *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1386 (5th Cir.1996)).



In the case before us, Midwest’s certification materials constitute “promotion” under the Lanham Act. The material was designed to provide industry consumer-purchasers with information relating to the nature and quality of Midwest’s gabions, i.e., that they conformed to the ASTM standards. Midwest’s promotion materials stated a fact; whether this fact was deceptive, misleading, or fraudulent in light of the ASTM standards is a matter to be adjudicated.

Presuming the facts as alleged in Terra Aqua’s complaint to be true, and drawing all inferences in Terra Aqua’s favor, Terra Aqua has alleged sufficient facts to support a claim under 15 U.S.C. § 1125(a)(1)(B) for the purpose of defeating Midwest’s motion to dismiss for failure to state a claim. We accordingly reverse the trial court’s dismissal under rule 12.02(6) of Terra Aqua’s claim under the Lanham Act.

### ***Holding***

We affirm the trial court’s dismissal for failure to state a claim under Tennessee Rule of Civil Procedure 12.02(6) of Terra Aqua’s tort claim for the intentional interference with prospective business relationship. We reverse dismissal for failure to state a claim of Terra Aqua’s claim under the Lanham Act. This cause is remanded for further proceedings consistent with this opinion. Costs of this appeal are taxed one-half to the Appellee, Midwest Construction Products Corporation, and one-half to the Appellant, Terra Aqua Gabions, Inc, and its surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE